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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The respondent bases a large part of the argument in his brief on a discussion of the state of the law in 1924 and 1925. We desire in this brief to answer some of these contentions.

Neither the state of the law in 1925 nor the advice which counsel may have given the respondent at that time would seem to be a conclusive bar against the Government. We, of course, agree with the respondent's statement (Br. 7) that he "was

entitled to consult counsel"; but we call attention to certain material which investigation in 1925 must have disclosed.

As long ago as 1821 Lord St. Leonards had written, "To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." Sugden, Powers, 3d ed., 434. This sentence merely stated a rule of law which too often, both before and since, has been obscured by legal verbiage.[1] This fact that a general power over property is the equivalent of absolute ownership was as true in 1925 as it was in 1821. The language of Lord St. Leonards had been quoted by this Court and made the basis of its decision in the year 1916 in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630. This case was, of course, available in 1925.

An effort is now made to distinguish that case on the ground that it involved only a question of constitutionality under the Fourteenth Amendment. (Br. 21.) That is, of course, true, but it avails the respondent nothing. This Court's opinion shows that the reason the Wisconsin statute was held constitutional was that a general power over property is equivalent to a fee, and the termination of such a power is thus in effect a transfer of the property.

Counsel for the respondent refer (Br. 6–7) to the power which he retained when he created the

[1] See, for example, the quotations on pp. 11–12 of the respondent's brief.

trusts as "technical" and "unfortunate and useless." But an examination of the trust instruments themselves shows that these characterizations are hardly justified. The powers to revoke the trusts are couched in the broadest language, disclosing fully the complete dominion of the respondent over the corpus. (Par. Eleventh of Exs. 2 and 15, R. 25, 63.) Of course it is immaterial whether the respondent exercised these powers to revoke or ever intended to exercise them; through them he was the complete master of the trust property, as much as if he had retained its legal ownership in fee. The respondent's intimate relation to the trusts and the trust property is shown not only by these powers, but also by his frequent exercise of the many other powers which he reserved over the property. (See p. 3 of our main brief.)

Furthermore, as we have pointed out in our main brief (pp. 9–11), the regulations of the Treasury Department, *promulgated more than eight months before the respondent terminated his power of revocation,* expressly provided that the termination of such a power was subject to the gift tax. Regulations 67, Art. 1.[2]

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[2] Counsel state (Br. 7) that one of the reasons which induced the respondent to terminate his powers was the Treasury's ruling that the payments of income under the trusts were subject to gift tax as long as he retained the powers to revoke. It is significant that this ruling was contained in the same article of the same regulations which held the termination of general powers to be taxable. Regulations 67, Art. 1.

We have argued in our main brief that this regulation was a reasonable and proper one, and we need not repeat that argument here. We have also argued that this regulation was in effect approved by Congress when it reenacted the statute in the Revenue Act of 1926 without change except as to the rate of tax. Counsel for the respondent take exception to this argument (Br. 23–24) and cite *Iselin* v. *United States,* 270 U. S. 245, 251. But the quotation which the respondent prints from that case shows its inapplicability, for this Court said that the administrative construction there involved "was neither uniform, general, nor long-continued." Here the regulation has been in force without change for more than eight years; it has been consistently applied by the Treasury Department; and at least one taxpayer has been subjected to tax under it only after an unsuccessful effort to invoke the jurisdiction of this Court. *Means* v. *United States,* 69 C. Cls. 539, certiorari denied, 282 U. S. 849.

Counsel refer (Br. 37–38) to "the sanctity inherent in decisions which have endured for years" and to "retroactive interpretation which falls like a trap upon those who have acted beyond recall." These references seem hardly relevant. A taxpayer who acts in the teeth of an explicit Treasury regulation certainly acts at his own risk and is scarcely in a position to urge that the statute taxing him is being given a "retroactive interpretation."

Four other points in the respondent's discussion of the law in 1925 deserve comment.

(1) In our original brief we said (p. 27) that it is "beyond question * * * that a valid trust can be created although a power to revoke is reserved." The ten quotations set out on pp. 8–11 of the respondent's brief appear to add nothing to this statement. Nor do the citations of *In re Dolan's Estate,* 279 Pa. 582, and *In re Hall's Estate,* 99 N. J. L. 1, aid the respondent's case. Those decisions are, of course, directly contrary to the decision of this Court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. And they did not stand unchallenged among the State decisions even in 1925. See, for example, *Estate of Bullen,* 143 Wis. 512; *In re Fulham's Estate,* 96 Vt. 308.

(2) Support is sought in the fact that in 1925 and now " a donor who creates a revocable trust must pay a stock transfer tax on all shares of stock in the trust when the trust is set up" and that " The Government has never attempted to impose the stock transfer tax upon the surrender of a power to revoke." (Br. 3, 19–20.) But the stock-transfer tax presents no analogy. That tax is laid on the "transfers of legal title to shares," not on the transfer of their beneficial ownership. Revenue Act of 1924, Sec. 800, Schedule A, par. 3; Revenue Act of 1932, Sec. 723. The present case is in this respect not distinguishable from any case like *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339,

where the fact that the creation of a trust of stock is subject to the stock-transfer tax does not prevent the termination at death of a power to revoke the trust from being subject to an estate tax.

(3) The respondent leans heavily on *United States* v. *Field*, 255 U. S. 257, and states (Br. 17) that this Court there held "that because she did not have title, because she did not in the common law sense, own the property, there was no 'transfer' from her to the appointees." There is no basis for this statement. This Court did not hold in the *Field case* that the exercise of the power did not result in a transfer. The tax in that case was laid, not, as here, on transfers of property, but only on "the transfer of the net estate." What this Court held was that the appointed property was not a part of the decedent's "net estate." This plainly appears from the quotation from the *Field case* printed by the respondent at p. 16 of his brief; in fact, the execution of a power of appointment is expressly referred to in this quotation as "a transfer." (See third full line from end of quotation on p. 16 of respondent's brief.)[3]

(4) Reference is made (Br. 22) to rulings of the Bureau of Internal Revenue concerning the

[3] A similar refusal to recognize the distinction between a *transfer of property* and a *transfer of the net estate* pervades the respondent's discussion of recent decisions of this Court at pp. 25–36 of his brief. See pp. 23–25 of our original brief.

taxability under the estate tax provisions of the Revenue Acts of 1918 and 1921 of property held in a revocable trust. It is stated that the Bureau first ruled that such property should be included in the donor's estate, and that "This ruling the Bureau rescinded after argument in 1923 (T. D. 3487, II–1 C. B. 303.[4])" This statement suggests the inference that the Bureau ruled in 1923 that property held in a revocable trust was not taxable. An examination of Treasury Decision 3487, which the respondent cites, shows that this inference is not warranted. The Bureau did rule for the time being (erroneously, as we now know) that a revocable trust was not *ipso facto* subject to the estate tax; but it held that such a trust would be taxable if its creator in fact intended it to take effect at death. Moreover, the very vacillation of the Bureau on this question should have served as a warning to the respondent.

CONCLUSION

The state of the law in 1925 (even if it were material) was such that the respondent was not justified in assuming that the termination of his powers to revoke would not be subject to the gift tax. Subsequent decisions of this Court, cited in our main brief, show that the then existing Treasury

[4] The correct reference is II–1 C. B. 301.

regulation holding such a termination taxable was a reasonable and correct construction of the statute.

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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